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No. 81-1021

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

In re Wheat Farmers Antitrust Class Action Litigation M.D.L. No. 129

JOE ZINSER, individually, and on behalf of all others similarly situated,

Petitioners,

v.

CLARENCE PALMBY and CONTINENTAL GRAIN COMPANY,

Respondents.

JOHN SPEARMAN, individually, and on behalf of all others similarly situated,

Petitioners,

v.

CLARENCE PALMBY and CONTINENTAL GRAIN COMPANY,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONERS' BRIEF IN REPLY

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QUESTIONS PRESENTED

Whether this Court's rule in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, *rehearing denied*, 434 U.S. 881 (1977), that a cause of action based on a horizontal price-fixing conspiracy cannot be brought by a party removed more than one step in the distribution chain from the price-fixer, also bars every restraint of trade claim brought pursuant to 15 U.S.C. § 1?

Whether that rule in *Illinois Brick* also bars every attempted monopolization and monopolization claim brought pursuant to 15 U.S.C. § 2?

Whether an antitrust plaintiff, who brings a class action and is successful in certifying that class, has a claim of right to reimbursement for reasonable expenses, court costs and attorneys' fees based on the doctrine of *quantum meruit* once the cause of action has, *ex post-facto*, been judicially banned?

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PETITIONERS' BRIEF IN REPLY

Petitioners, Zinser and Spearman submit this Brief in Reply in support of the petition for certiorari.

STATEMENT OF THE CASE

A. The Wheat Industry's Structure

Once the wheat farmer harvests his wheat crop, he is left with two choices. The farmer can either outright sell his wheat at the prevailing market price, or store his wheat until such time as he believes the market will provide a better price. In either case, he makes his decision based upon what information is available concerning the market at that time and what the market is likely to be in the near future.

The farmer's sale in the market triggers a series of subsequent decisions to sell or store at different levels until the wheat meets its final destination. Each level's participants contemplate the current market factors such as, albeit, supply, demand and current and potential price, in order to decide whether to sell or hold for a better market.

This is the market structure with which Petitioners dealt in 1972; a market in which the wheat sold travels downward in the distribution chain based on prices negotiated at each level. Petition for Certiorari, Add. at 1.

However, the Respondents contend that the market purchases move upward in the chain of distribution. Brief in Opposition at 8. That is, the exporter purchases from the elevators, and the elevator operators in turn purchase wheat from the wheat farmers.

Respondents' contention is fundamentally faulty — where does the elevator get its wheat to sell to the exporter should a sufficient number of farmers decide to store their wheat? In essence, Respondents' theory of the wheat market is based on two incorrect assumptions: first, assuming no antitrust violation, all wheat ultimately is destined for export, with exporters alone influencing the free market from a level within the distribution chain; and second, the wheat purchased by an exporter from the elevator operator is already placed in the market's

stream. The first assumption is contrary to actual operations of the wheat market and Petitioners' allegations and the second contrary to Respondents' contentions.

B. The Antitrust Violation

Petitioners' causes of action were dismissed on the pleadings, pleadings alleging violations of the antitrust laws. These pleadings emphatically stated that Continental Grain Company and Clarence Palmby had combined and conspired to restrain trade and that they attempted to, and did successfully, monopolize the grain sale to the Soviet Union in violation of Sections 1 and 2 of the Sherman Act.

However, Respondents, in their brief in opposition, go to exceedingly great lengths in an attempt to convince this Court of their innocence of the violations as pled. [1] However strongly Respondents may wish this case away without Petitioners having a full hearing on the merits, the fact of the matter is these actions were dismissed on the pleadings alone, without regard to the merits.

Respondents hurriedly contend that this case is identical to the issues raised in *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, *rehearing denied*, 616 F.2d 659 (5th Cir.), *cert. denied, Safeway Stores, Inc.* v. *Meat Price Investigators Association*, ____ U.S. ____ , 101 S.Ct. 280 (1980) ("the *Beef Case*"), where, on the pleadings, the plaintiffs alleged that the retail stores conspiratorially purchased their beef requirements from packers who then "passed-on" the undercharge by way of purchasing cattle from the plaintiffs. Not only are the pleadings in the *Beef Case* analytically contrary to the pleadings here, but marketing in the beef industry is structured differently from that in the wheat industry.

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[1] Curiously, Respondents donated approximately one-third of their brief attempting to "exonerate" themselves of the pleadings. Such is pure surpluage.

As much as Respondents would wed themselves to the *Beef Case*, curiously the Respondents break ranks with its holding that "the allegations of the complaints . . . are taken as true. . . ." 600 F.2d at 1154. No amount of self-adulation can circumvent the uncontroverted fact that neither judge nor jury has found against these Petitioners on the merits [2] and that these pleadings are to be taken as true.

REASONS FOR GRANTING THE WRIT

A. Emphatic Distinctions Must Be Made Between The Applicability Of *Illinois Brick* To Price Fixing Claims And Its Applicability To Monopolization Claims And Other Restraints Of Trade

1. *Illinois Brick* Must be Limited to "Pass-On" Allegations Alone Respondents claim that these cases fit squarely within *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, *rehearing denied*, 434 U.S. 881 (1977), and rely solely on the holding in the *Beef Case* to support their position.

However, Respondent's attempt to fit a square *Wheat* case into the *Illinois Brick* hole. Respondents have arbitrarily whittled the edges of the pleadings and discarded the shavings of the pleadings' combination and conspiracy to restrain trade and attempt to monopolize and successful monopolization of the grain sale to the Soviet Union, only to relabel the allegation and fit what it likes into the *Illinois Brick* hole.

There were no "pass-on" allegations in these pleadings which pre-date this Court's decision in *Illinois Brick*. Nor had the trial court ruled that the monopolization and attempt to monopolize claims were dismissed on the merits. Accordingly, the issue presented is whether, based on the allegations taken as true, it was within the intended ambit of *Illinois Brick* to dismiss non-"pass-on" claims of monopolization, attempt to monopol-

[2] As Respondents note, the trial court never addressed Respondents' summary judgment motion dealing with the merits of this case. Brief in Opposition at 9 n.*.

ize and restraint of trade based on suppression of the market information removed from the distribution chain.

B. The *Wheat* Decision Creates A Split In Circuits On The Question Of The Scope Of *Illinois Brick* And Denies Petitioners Equal Protection Of The Laws

Respondents admit that the absence of allegations of a "pass-on" renders *Illinois Brick* inapplicable. Brief in Opposition at 20. Since Respondents premise their brief on non-existent "pass-on" pleadings, they conveniently find *Fontana Aviation, Inc.* v. *Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980) has no factual bearing. However, the court in *Fontana Aviation* restricted the application of *Illinois Brick* to pure pleadings of "pass-on" antitrust allegations. The *Fontana* court held that *Illinois Brick* does not apply to any other antitrust allegation.

Respondents off-handedly dismissed the inequity posed by conflicting circuit and district court opinions as is evidenced by the footnote treatment of *Pollock* v. *Citrus Associates*, 512 F.Supp. 711 (S.D.N.Y. 1981). *Pollock* has recently been reaffirmed in the Southern District of New York by the district's heavy reliance of *Pollock* in *Stax* v. *Commodity Exchange, Inc.*, 524 F.Supp. 936 (S.D.N.Y. 1981).

Stax involved allegations that silver market participants:

> . . . [C]onspired to and did cause the price of refined silver and silver futures to rise, monopolize the trade in silver and seize control of supplies of refined silver and silver production facilities, in violation of federal and state antitrust laws . . .

524 F.Supp. at 937-938. The court, relying on *Pollock*, refused to apply *Illinois Brick* in a situation where the allegations were not injury resulting from a "pass-on," but rather injury caused by an illegal market impact which either stabilized or destabilized the entire market.

However, Respondents refuse to recognize the rationale of *Pollock* and *Stax*, preferring to stand on a footnote in *Pollock* which stated that " 'the plaintiffs and defendants . . . were in direct contact insofar as they were on opposite sides of the [relevant] market.' 512 F.Supp. at 718 n.7." Brief in Opposition at 15 n.*.

Quite clearly, the court in *Pollock* based its decision that *Illinois Brick* did not apply on a much broader principle:

> Regardless of whether the plaintiffs ultimately purchased offsetting contracts from the defendants or from other traders with a long position, the price throughout the market allegedly rose as a result of the defendants activities.

Pollock v. *Citrus Associates*, 512 F.Supp. at 719; cited with approval in *Stax* v. *Commodity Exchange, Inc.*, 524 F.Supp. at 940. *See Chatham Brass Co., Inc.* v. *Honeywell, Inc.*, 512 F.Supp. 108, 116 (S.D.N.Y. 1981) ("*Illinois Brick* does not bar a damages claim [based on Section 1 and 2 of the Sherman Act] since Chatham is complaining, not of injury resulting from the passing on of a price-fixing overcharge by middlemen, but rather of direct injury from Honeywell's alleged success in creating sufficient monopoly power to raise prices. . . .")

Accordingly, only this Court can resolve the clear split now existing between the Circuits on this very issue. The federal laws were intended to apply, and must be applied, uniformly to all persons subject to those laws. The lack of similar treatment among persons seeking to see under the antitrust laws, depending solely upon the circuit in which suit is filed or to which the Multidistrict Litigation Panel removes, creates a clear and arbitrary denial to *Zinser* and *Spearman* of the equal protection of the laws as guaranteed to them by the Fifth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, as well as in the interests of assuring effective enforcement of the federal antitrust laws, insuring even-handed administration of justice, and protecting the existence of a competitive and free market system, Petitioners respectfully request that this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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February 2, 1982

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court, has caused to be served the within Petitioners' Reply, upon all counsel of record in these proceedings as recited below on the 2nd day of February, 1982:

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